STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
H. SAAD, P.J., H. GAGE, and J. COOPER, JJ.

IN RE: KH, KL, KL and KJ, MINORS
_____/

FAMILY INDEPENDENCE AGENCY and OAKLAND COUNTY PROSECUTOR'S OFFICE,

Copetitioners-Appellees,

-vs-

Supreme Court No. 122666

TINA JEFFERSON, RICHARD JEFFERSON, FREDERICK HERRON and LARRY LAGRONE,

Respondents-Appellees.
_____/

Court of Appeals No. 244028
Circuit Court No. 1998-613188-NA

BRIEF ON APPEAL-APPELLEE OAKLAND COUNTY PROSECUTOR'S OFFICE

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

On September 25, 2003, this Honorable Court granted the guardian ad litem's application for leave to appeal, directing the following issues to be addressed:

> 1) Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father? 2) In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children? 3) Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act? 4) Given that MCR 3.921(C)(2)(b)[formerly, MCR 5.921(D [sic? (D)] (2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act? 5) Does *In re CAW* [469 Mich 192; 665 NW2d 475 (2003)] apply to this case?

In re KH, KL, KL and KJ, _ Mich _; 668 NW2d 891 (2003). Appendix 180b.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER A PUTATIVE FATHER HAS STANDING IN A JUVENILE CODE CHILD PROTECTIVE PROCEEDING TO REQUEST A PATERNITY DETERMINATION WHERE THE SUBJECT CHILDREN ALREADY HAVE A LEGAL FATHER?

Copetitioner contends the answer is: "No."

Respondent-legal father Richard Jefferson contends the answer is: "Yes."

Respondent-biological father LaGrone contends the answer is: "Yes."

Respondent-putative father Herron contends the answer is: "Yes."

Respondent-mother contends the answer is "No."

The guardian ad litem contends the answer is "Yes."

The family court answered: "Yes."

II. WHETHER THERE IS ANY LEGAL SIGNIFICANCE TO THE FAMILY COURT'S FINDING THAT THE PUTATIVE FATHER IS THE BIOLOGICAL FATHER OF THREE OF THE CHILDREN WHEN THE CHILDREN WERE CONCEIVED AND BORN DURING THE MOTHER'S MARRIAGE TO ANOTHER MAN?

Copetitioner contends the answer is: "No."

Respondent-legal father Richard Jefferson contends the answer is: "Yes."

Respondent-biological father LaGrone contends the answer is: "Yes."

Respondent-putative father Herron contends the answer is: "Yes."

Respondent-mother contends the answer is "No."

The guardian ad litem contends the answer is "Yes."

The family court answered: "Yes."

III. WHETHER THE JUVENILE COURT RULES PROVIDE GREATER STANDING TO A PUTATIVE FATHER THAN IS PROVIDED BY THE PATERNITY ACT?

Copetitioner contends the answer is: "No."

Respondent-legal father Richard Jefferson contends the answer is: "Yes."

Respondent-biological father LaGrone contends the answer is: "Yes."

Respondent-putative father Herron contends the answer is: "Yes."

Respondent-mother contends the answer is "No."

The guardian ad litem contends the answer is "Yes."

The family court answered: "Yes."

IV. WHETHER THE FAMILY COURT MAY DETERMINE THAT A CHILD WAS BORN OUT-OF-WEDLOCK AND, THEREBY, PROVIDE A PUTATIVE FATHER WITH AN OPPORTUNITY TO ATTEMPT TO OBTAIN LEGAL RIGHTS TO THAT CHILD?

Copetitioner contends the answer is: "Yes."

Respondent-legal father Richard Jefferson contends the answer is: "Yes."

Respondent-biological father LaGrone contends the answer is: "Yes."

Respondent-putative father Herron contends the answer is: "Yes."

Respondent-mother contends the answer is "No."

The guardian ad litem contends the answer is "Yes."

The family court answered: "Yes."

V. WHETHER *IN RE CAW* IS DISTINGUISHABLE FROM THE INSTANT CASE BECAUSE HERE THE FAMILY COURT DETERMINED THAT THE CHILDREN WERE BORN OUT-OF-WEDLOCK AND, THEREFORE, THERE WAS A COURT DETERMINATION WHICH ALLOWED THE BIOLOGICAL FATHER AN OPPORTUNITY TO PROCEED TO ESTABLISH LEGAL RIGHTS TO HIS CHILDREN?

Copetitioner contends the answer is: "Yes."

Respondent-legal father Richard Jefferson contends the answer is: "Yes."

Respondent-biological father LaGrone contends the answer is: "Yes."

Respondent-putative father Herron contends the answer is: "Yes."

Respondent-mother contends the answer is "Yes."

The guardian ad litem contends the answer is "Yes."

The family court did not answer this question because *In re CAW* was not decided at the time it issued its written opinion.

STATEMENT OF FACTS

The petition, which was filed by Oakland County Prosecutor's Office [OCPO] and the Family Independence Agency [FIA] as copetitioners, was authorized on April 29, 2002. Appendices 1b-6b. The petition sought the termination of the parental rights of Tina Jefferson and Richard Jefferson. Appendix 6b. A transcript of the preliminary hearing requesting authorization of the petition has not been provided.

The initial and pretrial hearing was held on May 8, 2002. Appendices 7b-24b. At that time, the Oakland County assistant prosecutor orally moved to amend the petition to include "all fathers." Appendix 10b. At that time, Tina Jefferson stated that Richard Jefferson was incarcerated. Appendix 10b. The guardian ad litem stated that Richard Jefferson was the "legal father to all the children and the rest are putative." Appendix 10b. The family court referee stated:

> we're only moving on one guy if there's a legal father and that's it. If he is actually legal and we can prove he's legal, that's it. So whoever is not appointed to represent legal father, understand that once I have prove [sic? proof] that he is legal father, that's as far as we're going.

Appendix 11b.

Larry LaGrone's court-appointed attorney stated that Larry LaGrone was the putative father of KeAngelo LaGrone and KeMaria LaGrone. Appendix 11b.

Frederick Herron's court-appointed attorney stated that Frederick Herron was the putative father of Kiara Herron. Appendix 11b.

Neither Richard Jefferson nor Frederick Herron had been served. Appendices 12b-13b. Frederick Herron's mother was in the courtroom and stated that she knew how to contact him. Appendix 14b.

The assistant prosecutor again moved to add the putative fathers. Appendices 13b-14b.

Larry LaGrone's court-appointed attorney noted that Larry LaGrone had been scheduled for a blood test and asked for the trial to be set after the date of that test. Appendix 15b. The family court referee stated that "that would normally make sense except for what you're telling me is no matter what happens in regards to the paternity test, he's still not legal father." Appendix 15b. Larry LaGrone's attorney agreed that there would "be an additional step." Appendix 15b. The referee again stated that "it doesn't matter" and "he's not going to be apart [sic? a part]" of the termination proceeding." Appendix 16b. Larry LaGrone's court-appointed attorney then stated:

> * * * if he's determined to be the father and the blood test shows that, he is prepared to take some action to set aside Mr. Jefferson's status as legal father. These parties -- these children were conceived during a marriage but no one disputes that Mr. Jefferson is not the actual father. And my understanding is it creates a legal presumption that can be overturned.

Appendix 16b. The family court referee then questioned whether the hearing should be held in abeyance for that action to be taken. Appendix 16b. Larry LaGrone's court-appointed attorney indicated that he was just making the request and letting the court know what was happening. Appendix 16b.

The matter was adjourned and it was determined that Richard Jefferson needed to be writted back for the next hearing. Appendix 18b. It was also determined that Frederick Herron would be served by publication. Appendix 19b.

The referee stated:

> I need Mr. Touchstone [the protective services' worker] to find out if there's any information in any court that the paternity in regards to any of these kids has been challenged, on behalf of Mr. Herron and Mr. Lagrone [sic? LaGrone].

Appendix 19b.

The referee granted the copetitioner's oral motion to amend the petition. Appendix 19b.

KeAngelo LaGrone, KeMaria LaGrone and KeJuan Jefferson were placed with Ennis. Appendices 20b-21b. Kiara Herron was placed with Frederick Herron's mother, who was referred to as "[p]utative grandmother" and "fictive kin." Appendices 21b-22b.

On June 5, 2002, an order adding Larry LaGrone and Frederick Herron to the petition was entered. Appendix 25b.

On the date scheduled for trial, Richard Jefferson was present. Appendix 29b. Richard Jefferson stated that he and Tina Jefferson were married on May 24, 1988. Appendix 29b. Richard Jefferson stated that he was in the process of gathering the paperwork to file a divorce action. Appendix 32b.

Frederick Herron's court-appointed attorney objected to proceeding to trial, indicating that he had not been properly served. Appendix 31b. The referee stated:

> Well, in regards to father at this point in time, Mr. Jefferson indicates that he's been married to mother since 1988. All of the birth dates in regards to these kids is [sic? are] after 1988. Mr. Jefferson is the legal father in regards to all of the children so unless there's a challenge otherwise, there's no reason for Mr. Herron or Mr. Lagrone [sic? LaGrone] to be a part of this matter.

Appendix 32b.

Larry LaGrone's court-appointed attorney asked the referee to make a finding that Richard Jefferson was not the legal father of the children as well as to make a determination that the children were born out-of-wedlock and, thereby, allow Larry LaGrone to establish a legal relationship to the children. Appendix 33b.

Tina Jefferson continued to maintain that Richard Jefferson had been in prison. Appendix 33b. Tina Jefferson added that the biological father of KeMaria, KeJuan and KeAngelo was

Larry LaGrone and that the biological father of Kiara Herron was Frederick Herron. Appendix 34b.

Tina Jefferson was put under oath and testified that Frederick Herron was the biological father of Kiara Herron and that Larry LaGrone was the biological father of KeMaria, KeAngelo and KeJuan. Appendix 35b. Tina Jefferson also testified that Richard Jefferson was in prison from 1992 to 1996. Appendix 35b. Tina Jefferson testified that Richard Jefferson returned home for approximately six months and then returned to prison for four years. Appendix 35b. Tina Jefferson added that Richard Jefferson returned home for a second time and then was sent back to prison. Appendix 35b.

Tina Jefferson also testified that she and Richard Jefferson "never had any contact." Appendix 35b.

Finally, Tina Jefferson again testified that Frederick Herron was Kiara Herron's biological father and that Larry LaGrone was the biological father of KeAngelo, KeMaria and KeJuan. Appendices 35b-36b.

As noted in the original petition, Kiara Herron was born on August 27, 1994. Appendix 1b. KeAngelo LaGrone was born on January 19, 1998; KeMaria LaGrone, on January 21, 1999; and KeJuan Jefferson, on April 6, 2000. Appendices 2b-3b.

Mr. Touchstone, who was not put under oath, indicated that there was a DNA finding that Larry LaGrone was the biological father of KeAngelo, KeMaria and KeJuan. Appendix 36b.

The referee then found:

> * * * the biological father of the last three kids is Mr. Lagrone [sic? LaGrone] but that does not give him any legal standing, and I'm not going to make a determination in regards to anything in regards to legal standing on today's date and time based on the fact that I was just handed the Girard case, which is Michigan 437 at 231, and it's spelled G-I-R-A-R-D [*Girard v Wagenmaker,* 437

> Mich 231; 470 NW2d 372 (1991)], and I'm not able to adequately read it through to see if there's any differences between this particular case that I have before me and the case at hand. So based on that, we will have Judge Young make a decision.

Appendix 36b.

Larry LaGrone was in family court at that time and had been arrested for a probation violation on a charge involving an attempt to deliver. Appendix 37b. The referee told Larry LaGrone to return to court on July 26, 2002. Appendix 38b. The referee then stated that the writ on Richard Jefferson would have to be continued. Appendix 38b. At that point, Richard Jefferson's attorney stated:

> * * * after speaking to my client--and obviously, my client's position is that he is not the biological father of any of these children. He has indicated to me he does not wish to partake in these proceedings, he does not wish to be here, he would like to be taken back so that he can continue his educational path that he's on at his current institution. He does not want to be here for the trial date.

Appendix 38b.

The referee responded:

> I'm not making a determination at this point in time, and based on the information I have, he's the legal father. Until there's a determination, he's going to be participating in these proceedings, okay? So he'll stay here until the 26th. At that point in time, once everything's straightened out and Judge Young makes a determination one way or the other, then he can proceed back. In regards to Mr. Herron, I will make sure that he is served but at this point in time, he really has no legal standing in regards to this child.

Appendix 38b.

On July 9, 2002, Larry LaGrone's court-appointed attorney filed a "motion for determination of legal father." Appendices 41b-42b.

On July 23, 2002, Larry LaGrone's motion was opposed by Tina Jefferson's attorney. Appendices 43b-51b

On July 24, 2002, Larry LaGrone's court-appointed attorney filed a brief in support of his motion. Appendices 52b-55b.

On July 26, 2002, Oakland County Family Court Judge Joan E. Young heard Larry LaGrone's motion. Appendices 56b-97b. At that time, Tina Jefferson's attorney objected that Larry LaGrone had no standing to bring the motion. Appendix 61b. Despite the objection, Larry LaGrone's court-appointed attorney was allowed to proceed. Appendix 61b.

During oral argument on the motion, the guardian ad litem and Tina Jefferson's attorney noted that FIA had a policy of terminating putative fathers even after legal fathers had been terminated so that the children could be adopted without the possibility of a putative father obtaining some legal rights. Appendices 82b-83b. The People would note that *In re CAW,* 469 Mich 192; 665 NW2d 475 (2003), had not been decided when Larry LaGrone's motion was argued.

The guardian ad litem also noted that the putative father or his family might be suitable placements for the children. Appendix 85b.

During oral argument, Judge Young questioned whether she had authority under the Juvenile Code to determine paternity. Appendices 86b and 88b. At that time, the guardian ad litem agreed that the Juvenile Code was silent. Appendix 86b.

Larry LaGrone's motion was taken under advisement and the parties were given an opportunity to file supplemental authority. Appendices 94b-96b and 98b.

On August 5, 2002, the court-appointed attorney for Frederick Herron filed a brief in support of Larry LaGrone's motion. Appendices 99b-100b.

On August 8, 2002, the guardian ad litem, relying on *In re Montgomery,* 185 Mich App 341; 460 NW2d 610 (1990), filed a response which stated that Larry LaGrone's motion should

be "GRANTED" or that, in the alternative, the circuit court certify the matter for immediate resolution by this Honorable Court. Appendices 101b-104b. Nevertheless, the guardian ad litem noted concerns with extinguishing the rights of legal fathers who were involved in the lives of their non-biological children up until the time termination proceedings began. Appendix 104b.

On August 9, 2002, Tina Jefferson's attorney filed a supplemental memorandum. Appendices 105b-125b.

On September 9, 2002, Judge Young issued her opinion and order. Appendices 126b-133b. Judge Young ruled that she was bound to follow *In re Montgomery, supra.* Appendix 133b. Judge Young ended her opinion and order, stating:

> Respondent Larry LaGrone's motion to determine that he is the legal father of Keangelo [sic? KeAngelo] LaGrone, KeMaria LaGrone, and KeJuan Jefferson is granted.

Appendix 133b.

On September 23, 2002, the parties appeared for a bench trial. Appendices 134b-153b. Richard Jefferson, Larry LaGrone and Frederick Herron were not present. Appendices 137b and 141b. At that time, the referee indicated that she did not need publication on Frederick Herron because "he is not the legal father." Appendix 137b. Richard Jefferson's attorney indicated that Richard Jefferson was the legal father of Kiara Herron. Appendix 137b. Richard Jefferson's step-mother was in court as was Frederick Herron's mother. Appendix 139b.

Tina Jefferson's attorney reported that Tina Jefferson had been in the hospital and was expected to remain there until mid-October when she was due to give birth to another child. Appendices 140b-141b.

After reading Judge Young's opinion and order, the referee stated:

> * * * she made the finding that he was the legal father of those three children, despite her feelings that she didn't want to do that. She believed that that was what she was obligated to do under her reading of the law as it stands at this time.

Appendix 143b.

Regarding Frederick Herron, the referee stated:

> We do not have, we do not have service on Ms. Shuman's client [Frederick Herron] and while I don't believe that he really is entitled to anything because he's not the legal father, I'm going to discuss it with Judge Young and find out whether or not we need to do publication.

Appendix 144b.

Mr. Touchstone stated that he had sent Frederick Herron a letter about paternity testing on July 17, 2002, and had received no response. Appendices 144b-145b.

Tina Jefferson's attorney placed a continuing objection on the record to Frederick Herron and Larry LaGrone receiving any standing. Appendix 145b. The referee responded: "The caselaw [sic? case law] is quite clear and it's the controlling caselaw [sic? case law] at this point." Appendix 146b. Tina Jefferson's attorney replied that *In re Montgomery, supra,* had been decided before *Girard, supra*, and therefore, "it's not good case [sic? law] anymore." Appendix 146b.

In light of Tina Jefferson's hospitalization, the referee again adjourned the matter to November 25, 2002. Appendix 150b.

The referee informed Frederick Herron's attorney:

> * * * we're going to get actual service and it will have in there that he has been determined to be the putative father and that he has to establish paternity within fourteen days or then he will lose all rights in regards to the kids or child. It's only one child [Kiara Herron].

Appendix 151b.

On September 23, 2002, the guardian ad litem filed an "emergency motion for authority to seek an application for leave to appeal; certification by trial court for immediate resolution by the Court of Appeals." Appendices 154b-156b.

That motion was apparently heard on September 25, 2002, but no transcript has been provided. Appendix 157b.

On September 27, 2002, the family court entered an order granting the motion and appointing the attorneys to continue on appeal. Appendix 157b.

On October 3, 2002, Judge Young entered an order which provided:

> * * * father Frederick Herron has 14 days to have a paternity test or waive all rights to further notice including the right to notice of termination of parental rights and legal right to counsel. . . .

Appendix 158b.

The family court docket entries are attached as Appendices 159b-171b.

The guardian ad litem timely filed an application for leave to appeal with the Court of Appeals, which, following a response by Tina Jefferson's attorney, was denied "for failure to persuade the Court of the need for immediate appellate review." *In re Herron, LaGrone, & Jefferson Minors*, order of the Court of Appeals (Docket No. 244028, rel'd November 1, 2002). Appendix 172b.

The Court of Appeals' docket entries for Docket Number 244028 are attached as Appendices 173b-175b.

The guardian ad litem then filed an application for leave to appeal and a motion for immediate consideration with this Honorable Court. Appendix 174b. In lieu of granting leave to appeal, this Honorable Court remanded the case to the Court of Appeals to consider as on leave

granted. *In re KH, KL, KL, and KJ,* 467 Mich 899; 654 NW2d 330 (2002). Appendix 176b. This Honorable Court further ordered the Court of Appeals to expedite the case. Appendix 176b.

Following this Honorable Court's remand order, the Court of Appeals assigned the case a new docket number, entered an order expediting it and directed it to be placed on the first available case call. *In re Herron, Lagrone, and Jefferson Minors,* order of the Court of Appeals (Docket No. 244969, rel'd November 27, 2002). Appendix 177b.

On December 26, 2002, this Honorable Court vacated its November 19, 2002 remand order, reconsidered the application for leave to appeal and ordered the application for leave to appeal to be held in abeyance for *In re Weber,* which ultimately became *In re CAW, supra. In re KH, KL, KL, and KJ,* _ Mich _; 656 NW2d 520 (2003). Appendix 178b.

On May 30, 2003, the Court of Appeals entered an order holding Docket Number 244969 in abeyance for *In re Weber. In re Herron/Lagrone/Jefferson,* order of the Court of Appeals (Docket No. 244969, rel'd May 30, 2003). Appendix 179b.

On September 25, 2003, this Honorable Court having decided *In re CAW*, granted the application for leave to appeal, directing the following issues to be addressed:

> 1) Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father? 2) In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children? 3) Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act? 4) Given that MCR 3.921(C)(2)(b)[formerly, MCR 5.921(D [sic? (D)] (2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act? 5) Does *In re CAW* apply to this case?

In re KH, KL, KL and KJ, supra. Appendix 180b.

On October 1, 2003, the Court of Appeals vacated its May 30, 2003 order and dismissed Docket Number 244969. *In re Herron/Lagrone/Jefferson,* order of the Court of Appeals (Docket No. 244969, rel'd October 1, 2003). Appendix 181b.

The Court of Appeals' docket entries for Docket Number 244969 are attached as Appendices 182b-186b.

The guardian ad litem filed his brief on appeal on October 20, 2003.

This is copetitioner's brief on appeal.

ARGUMENT

I. A PUTATIVE FATHER DOES NOT HAVE STANDING IN A JUVENILE CODE CHILD PROTECTIVE PROCEEDING TO REQUEST A PATERNITY DETERMINATION WHERE THE SUBJECT CHILDREN ALREADY HAVE A LEGAL FATHER.

Issue Preservation:

This Honorable Court granted leave, directing the parties to address the following issue:

> 1) Does a putative father have standing in a Juvenile Code child protective proceeding to request a paternity determination where the subject children already have a legal father?

In re KH, KL, KL, and KJ, supra. Appendix 180b.

Standard of Review:

Because this case involves questions of statutory construction and law, the standard of review is de novo. *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001); *People v Thomas,* 438 Mich 448, 460; 475 NW2d 258 (1991).

Discussion:

Before attempting to address the questions asked by this Honorable Court, copetitioner would note that its foray into the worlds of "legal fathers", "biological fathers," "natural fathers", "presumed fathers", "putative fathers" and "equitable fathers" along with the Juvenile Code [MCL 712A.1 *et. seq.*], the Divorce Act [MCL 552.1 *et. seq.*], the Support and Visitation Enforcement Act [MCL 552.601 *et. seq.*], the Child Custody Act [MCL 722.21 *et. seq.*], the Adoption Code [MCL 710.21 *et. seq.*], the Paternity Act [MCL 722.711 *et. seq.*], the Acknowledgement of Parentage Act [MCL 722.1001 *et. seq.*] and the intestate succession laws [MCL 700.2101 *et. seq.*], along with the Michigan Court Rules [formerly MCR 5.900, but now

MCR 3.900] left copetitioner feeling a lot like Lou Costello in the famous "Who's On First" act, often repeating "I don't know." "Third base."

That being said, copetitioner filed the initial petition in this case seeking termination of Tina and Richard Jefferson's parental rights under MCL 712A.19b. Appendices 1b-6b. The subsections under which copetitioners sought termination of Richard and Tina Jefferson's parental rights refer to "a parent's parental rights" or "[t]he parent" or "[t]he parent's rights". MCL 712A.19b(3)(a)(ii), (g), (j), (*l*) and (m).[1] While the word "parent" is undefined in the Juvenile Code, MCL 712A.1 *et. seq.*, giving the word "parent" its plain meaning, *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999), copetitioner submits that it must refer to the legal parent (*i.e.,* the father or mother who has legally-recognized rights to a child which can be terminated). See and compare *Aichele v Hodge,* __ Mich App __ ; __ NW2d __ (2003)(Docket No. 247021, rel'd October 21, 2003), slip op. at 9, where the Court of Appeals held that absent a prior judicial determination otherwise, a putative father was not a parent under the Child Custody Act when a child was born during a marriage.

Under Michigan law, Richard Jefferson, who was married to Tina Jefferson at the time of the conceptions of Kiara Herron, KeAngelo LaGrone, KeMaria LaGrone and KeJuan Jefferson, is their legal father. See MCL 333.2824, which provides in part that "the name of the husband at the time of conception or, if none, the husband at birth shall be registered as the father of the child" as well as MCL 552.29, which provides that "[t]he legitimacy of all children begotten

[1] Copetitioner notes that MCL 712A.19b(3)(a)(i) provides for termination when "the child's parent is unidentifiable, has deserted the child for 28 or more days, and has not sought custody of the child during that period." Here, the parent of the child is identifiable and copetitioner believes that MCL 712A.19b(3)(a)(i) covers situations when a child is abandoned and that child's parent cannot be identified.

before the commencement of any action under this act [the divorce act] shall be presumed until the contrary be shown."

The Juvenile Code has no provision for determining paternity. Instead, paternity determinations are made under the Paternity Act, MCL 722.711 *et. seq.* In *Girard v Wagenmaker,* 437 Mich 231, 241-242; 470 NW2d 372 (1991), this Honorable Court held that a putative father does not have standing to file a paternity action under the Paternity Act unless the child was "born out of wedlock". A child is "born out of wedlock" if, before the paternity complaint is filed, the circuit court determined that the child is "not the issue of" the mother's marriage. *Id.* at 242-243. Absent a previous action undertaken by the circuit court to determine the child's paternity, a putative father lacks any standing to pursue a paternity claim under the Paternity Act. *Id.*

In *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 738-739; 629 NW2d 900 (2001)(quoting *House Speaker v Governor,* 441 Mich 547, 554; 495 NW2d 539 [1993]), this Honorable Court noted that "[s]tanding is a legal term" and adopted the *Lujan* [*Lujan v Defenders of Wildlife,* 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992)] test for determining whether an individual has standing. There are three elements to establishing standing, including that one have a legally-protected interest. *Lee, supra,* 739-740. In *Girard, supra,* this Honorable Court noted that standing is determined at the time of the individual's filing.

Under *Girard, supra,* neither Larry LaGrone nor Frederick Herron had standing to bring a paternity action under the Paternity Act because the children were born during a marriage and there was no prior judicial determination that the children were "born out of wedlock." Moreover, as discussed above, there is no method for determining paternity in a Juvenile Code

child protective proceeding when the mother of the child is married to another man at the time of the conception or birth of that child.

Nevertheless, copetitioner anticipates that Larry LaGrone will now attempt to claim some type of liberty interest in his biological children which could not be terminated without notice. Here, Larry LaGrone's motion only alleged a biological link to the children and, as such, a state law affording him no rights is constitutional. See and compare *Michael H v Gerald D,* 491 US 110; 109 S Ct 2333; 105 L Ed 2d 91 (1989). Even if Larry LaGrone would have alleged more than a biological link to the children, in *Aichele, supra,* slip op. at 11-12, the Court of Appeals held:

> There has yet to be any determination in this state that a putative father of a child born **in wedlock** without a court determination of paternity has a protected liberty interest with respect to a child he claims as his own. (Emphasis supplied.)

See also *In re CAW (On Remand),* __ Mich App __ ; __ NW2d __ (2003)(Docket No. 235731, rel'd October 23, 2003), and *McHone v Sosnowski,* 239 Mich App 674; 609 NW2d 844 (2000). The People would note that this Honorable Court declined to address the alleged putative father's constitutional claim in *Girard, supra,* at 234-235 n 3, but noted that Michigan's paternity statute was "not as preclusive as the California statute upheld by the United States Supreme Court in *Michael H.*"

Having no method to obtain legal rights on their own to children born while the mother was married to another man, Larry LaGrone and Frederick Herron do not have standing under the Juvenile Code child protective proceeding because they have no legal parental rights to be terminated. Consequently, neither Larry LaGrone, the biological father of three of the children, nor Frederick Herron, purported-putative father of one of the children, is a legal parent who could be a party to a proceeding which seeks to terminate legal parental rights to a child.

II. THERE IS NO LEGAL SIGNIFICANCE TO THE FAMILY COURT'S FINDING THAT THE PUTATIVE FATHER IS THE BIOLOGICAL FATHER OF THREE OF THE CHILDREN WHEN THE CHILDREN WERE CONCEIVED AND BORN DURING THE MOTHER'S MARRIAGE TO ANOTHER MAN.

Issue Preservation:

This Honorable Court granted leave, directing the parties to address the following issue:

> 2) In this case, what is the legal significance of the trial court's finding that the putative father is the biological father of three of the children?

In re KH, KL, KL, and KJ, supra. Appendix 180b.

Standard of Review:

See Issue I.

Discussion:

The trial court's factual finding that Larry LaGrone is the biological father of three of the children has no legal significance on its own. See discussion in Issue I.

Copetitioner would add that the Legislature knows how to address putative fathers when it intends to do so. See MCL 333.9132(1)-(2) and (4),[2] MCL 333.21533,[3] MCL 400.57(1)(b),[4] MCL 400.231(d),[5] MCL 400.234(2)[6] and MCL 712.12.[7]

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[2] "(1) * * * The consent of any other person, including the putative father of the child . . . . (2) Before providing health care to a minor pursuant to this section, a health facility or agency of a health professional shall inform the minor that the putative father of the child or the minor's spouse, parent, guardian, or person in loco parentis may be notified pursuant to subsection (4). * * * (4) For medical reasons, the treating physician, and on the advice and direction of the treating physician, a member of the medical staff of a health facility or agency or other health care professional may, but is not obligated to, inform the putative father of the child . . . ."

[3] "Upon request, the department shall provide to an unmarried mother of a child or to a putative father an acknowledgement of parentage form that can be completed by the child's mother and father to acknowledge the child's paternity as provided in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013. The department shall provide to the mother and putative father the information developed as required by section 21532 on the purpose and completion of the form and on the parents' rights and responsibilities."

[4] "'Caretaker' means an individual who is acting as parent for a child in the absence or because of the disability of the child's parent or stepparent and who is the child's legal guardian, grandparent, great grandparent, great-great grandparent, sibling, stepsibling, aunt, great aunt, great-great aunt, uncle, great uncle, great-great uncle, nephew, niece, first cousin, or first cousin once-removed, a spouse of any person listed above, a parent of the putative father, or an unrelated individual aged 21 or older whose appointment as legal guardian of the child is pending."

[5] "'Adult responsible for the child' means a parent, relative who has physically cared for the child, putative father, or current or former guardian of a child, including an emancipated or adult child."

[6] "The director of the office or his or her designee may issue an administrative subpoena to require an entity to furnish information or a record in the possession of the entity that pertains to a parent or putative father . . . ."

[7] "* * * If the results of the analysis of genetic testing material from 2 or more persons indicate a probability of paternity or maternity greater than 99%, the contracting laboratory shall conduct additional genetic testing until all but 1 of the putative fathers or putative mothers is eliminated, unless the dispute involves 2 or more putative fathers or putative mothers who have identical DNA."

The Legislature has also set forth very specific statutory procedures to address and then terminate putative fathers' rights under the Adoption Code. See MCL 710.22(f)(i)-(iii), (v)-(vii), (xi), MCL 710.23d(1)(c)(v) and (2)(d), MCL 710.24a(2)(b) and (5)(d), MCL 710.31(3), MCL 710.34(1) and (2)(b)-(d), MCL 710.36(2), (3)(a)-(b), (4) and (5), MCL 710.37, MCL 710.39 and MCL 710.51(6).

As discussed in Issue I, putative fathers are not addressed in the Juvenile Code child protective proceedings because there is nothing to be terminated until they acquire legal parental rights. See Issue I.

As the United States Supreme Court made clear in *Michael H, supra,* 124, biology does not create legal rights to a child because then a rapist would have them.[8] For the reasons discussed in Issue I, Larry LaGrone has not alleged a liberty interest entitling him to due process notice of the termination proceedings. Compare MCL 710.37 in the Adoption Code which provides for termination of a putative fathers' rights so that a child born out of wedlock as defined in MCL 710.22(g) may be freed for adoption.

[8] Copetitioner would note that the Uniform Parentage Act, which is available for viewing at http://www.law.upenn.edu/bll/ulc/ulc.htm, gives biological fathers the right to seek a paternity determination; however, that Act has not been adopted by Michigan's Legislature.

III. THE JUVENILE COURT RULES PROVIDE NO GREATER STANDING TO A PUTATIVE FATHER THAN IS PROVIDED BY THE PATERNITY ACT.

Issue Preservation:

This Honorable Court granted leave, directing the parties to address the following issue:

> 3) Do the juvenile court rules provide greater standing to a putative father than is provided by the Paternity Act?

In re KH, KL, KL, and KJ, supra. Appendix 180b.

Standard of Review:

See Issue I.

Discussion:

The provisions of the juvenile court rules are discussed in Issue IV, *infra.* However, regardless of how those rules are interpreted, court rules can never provide standing where a statute does not.

Const 1963, art 6, § 5, provides in part: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." MCR 1.103 carries forth this constitutional mandate providing, in part, that: "The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan." MCR 5.901(A) further carries forth this mandate by providing:

> The rules in this subchapter, in subchapter 1.100 and in rule 5.113 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

As discussed in *McDougall v Schanz,* 461 Mich 15, 26; 597 NW2d 148 (1999), this Honorable Court's constitutional rule-making authority extends only to matters of practice and procedure. This Honorable Court "is not authorized to enact court rules that establish, abrogate,

or modify the substantive law." *Id.* at 27. This Honorable Court may not promulgate procedural rules contrary to legislative enactments that involve nonconstitutional substantive policies. *People v Glass,* 464 Mich 266, 281 fn 11; 627 NW2d 261 (2001).

Accordingly, the Juvenile Court Rules can never be interpreted in a manner that would grant greater standing to a putative father than is provided by the Paternity Act or the Juvenile Code. The Juvenile Court Rules cannot grant substantive legal rights. They are merely rules of practice and procedure.

The Paternity Act establishes the legal substantive rights, if any, of a biological father to establish his paternity over a child born out of wedlock. The Legislature has determined that a putative father does not have standing to file a paternity action under the Paternity Act unless the child was "born out of wedlock". *Girard, supra.* In the case of a child conceived or born during a woman's marriage to another man, a child is "born out of wedlock" if, before the paternity complaint is filed, the circuit court determined that the child is "not the issue of" the mother's marriage. *Id.* at 242-243. Thus, absent this previous determination of the child's paternity, a putative father lacks standing to pursue a paternity claim under the Paternity Act or the Juvenile Code as discussed in Issue I.

In sum, to the extent there is any conflict between the Paternity Act and the Juvenile Court Rules, the substantive law of the Paternity Act controls.

IV. THE FAMILY COURT MAY DETERMINE THAT A CHILD WAS BORN OUT-OF-WEDLOCK AND, THEREBY, PROVIDE A PUTATIVE FATHER WITH THE ABILITY TO ATTEMPT TO OBTAIN LEGAL RIGHTS TO THAT CHILD.

Issue Preservation:

This Honorable Court granted leave, directing the parties to address the following issue:

> 4) Given that MCR 3.921(C)(2)(b)[formerly, MCR 5.921(D[sic? (D)](2)(b)] authorizes a family division judge to determine that a putative father is the child's "natural" father, does the rule authorize that judge to determine that the putative father is the legal father or must the putative father file a complaint pursuant to the Paternity Act?

In re KH, KL, KL, and KJ, supra. Appendix 180b.

Standard of Review:

See Issue II.

Discussion:

Copetitioner will contrast the old and new court rules by placing them side-by-side. Identical language will be italicized and the language especially pertinent to this appeal will be bolded.

MCR 5.903(A)	**MCR 3.900**
(1) "Child born out of wedlock" means a child conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage.	Deleted under the new rules (See Note to 2003 Rules)[9]

[9] Appellee-LaGrone's brief mistakenly cites to MCR 3.903(A) as continuing the "child born out of wedlock" definition when it does not.

MCR 5.903(A)

* * *

(4) *"Father" means:*

***(a) a man married to the mother at any time from a minor's conception to the minor's birth unless* the minor is determined to be a child born out of wedlock;**

(b) a man who legally adopts the minor;

(c) a man who was named on a Michigan certificate for a minor born after July 20, 1993, as provided by MCL 333.21532; MSA 14.15(21532); or

(d) a *man whose paternity is established* in one of the following ways within time limits, when applicable, set by the court pursuant to this subchapter:

(i) the man and the mother of the minor acknowledge that he is the minor's father by completing and filing an acknowledgement of paternity. The man and mother shall each sign the acknowledgement of paternity. The *man and mother* shall *each sign the acknowledgement of* paternity in the presence of 2 witnesses, who shall also sign the acknowledgement, and in the presence of a judge, clerk of the court, or notary public appointed in this state. *The acknowledgement shall be filed at either the time of birth or another time during the child's lifetime with the* probate court in the mother's county of residence or, if the mother is not a resident of this state when the acknowledgement is executed, in the county of the child's birth.

(ii) the man and the mother file a joint written request for a correction of the certificate of birth pertaining to the minor that results

MCR 3.903(A)

* * *

(7) *"Father" means:*

***(a) A man married to the mother at any time from a minor's conception to the minor's birth, unless* a court has determined, after notice and a hearing, that the minor was conceived or born during the marriage, but is not the issue of the marriage;**

(b) A man who legally adopts the minor;

(c) *A man who by order of filiation or by judgment of paternity is* judicially determined *to be the father of the minor*;

(d) A man judicially determined to have parental rights; or

(e) A *man whose paternity is established* by the completion and filing of an acknowledgement of parentage in accordance with the provisions of the Acknowledgement of Parentage Act, MCL 722.1001, *et seq.*, or a previously applicable procedure. For an acknowledgement under the Acknowledgement of Parentage Act, the *man and mother* must *each sign the acknowledgement of* parentage before a notary public appointed in this state. *The acknowledgement shall be filed at either the time of birth or another time during the child's lifetime with the* state registrar.

in issuance of a substituted certificate recording the birth.
(iii) the man acknowledges that he is the minor's father by completing and filing an acknowledgement of paternity, without the mother joining in the acknowledgement if she is disqualified from signing the acknowledgement by reason of mental incapacity, death, or any other reason satisfactory to the probate judge of the county of the mother's residence or, if the mother is not a resident of this state when the man signs the acknowledgement, of the county of the minor's birth.
(iv) a man who by order of filiation or by judgment of paternity is determined judicially *to be the father of the minor.*

* * *

(12) *"Parent" means* a person who is legally responsible for the control and care of the minor, including a mother, father, guardian, or custodian, other than a custodian of a state facility, a guardian ad litem, or a juvenile court-ordered custodian.
(13) *"Party" includes the*

* * *

(b) *petitioner, child,* respondent parent, or other parent or *guardian in a protective proceeding.*

* * *

MCR 5.921 Persons Entitled To Notice

* * *

(D) Putative Fathers. *If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR* 5.903(A)(4), *the court may, in its discretion take*

* * *

(17) *"Parent" means* the mother, the father as defined in MCR 3.903(A)(7), or both, of the minor.

(18) *"Party" includes the*

* * *

(b) *petitioner, child,* respondent, and parent, *guardian,* or legal custodian *in a protective proceeding.*

* * *

(23) "Putative father" means a man who is alleged to be the biological father of a child who has no father as defined in MCR 3.903(A)(7).

* * *

MCR 3.921 Persons Entitled To Notice

* * *

(C) Putative Fathers. *If, at any time during the pendency of a proceeding the court determines that the minor has no father as defined in MCR* 3.903(A)(7), *the court may, in its discretion, take*

appropriate action as described in this subrule.

(1) *The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in the* manner as provided in MCR 5.920. *The notice* shall *include the following*:

(a) *that a petition has been filed with the court;*

(b) *the time and place of hearing at which the natural father is to appear to express his interest, if any, in the minor; and*

(c) *a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.*

(2) After notice to the putative father as provided in subrule (D)(1), *the court may conduct a hearing and determine that:*

(a) the putative father has been personally served or *served in* some other *manner* which *the court finds to be reasonably calculated to provide notice to the putative father.* If so, the court may proceed in the absence of the putative father.

(b) a preponderance of the evidence establishes that the putative father is the

appropriate action as described in this subrule.

(1) *The court may take initial testimony on the tentative identity and address of the natural father. If the court finds probable cause to believe that an identifiable person is the natural father of the minor, the court shall direct that notice be served on that person in* any manner reasonably calculated to provide notice to the putative father, including publication if his whereabouts remain unknown after diligent inquiry. Any notice by publication must not include the name of the putative father. If the court finds that the identity of the natural father is unknown, the court must direct that the unknown father be given notice by publication. *The notice* must *include the following* information:

(a) if known, the name of the child, the name of the child's mother, and the date and place of birth of the child;

(b) *that a petition has been filed with the court*;

(c) *the time and place of hearing at which natural father is to appear to express his interest, if any, in the minor; and*

(d) *a statement that failure to attend the hearing will constitute a denial of interest in the minor, a waiver of notice for all subsequent hearings, a waiver of a right to appointment of an attorney, and could result in termination of any parental rights.*

(2) After notice to the putative father as provided in subrule (C)(1), *the court may conduct a hearing and determine*, as appropriate, *that:*

(a) the putative father has been served in a *manner* that *the court finds to be reasonably calculated to provide notice to the putative father.*

(b) a preponderance of the evidence establishes that the putative father is the

natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR* 5.903(A)(4); provided that if the court decides the interests of justice so require, it shall not be necessary for the mother of the minor to join in an acknowledgment. *The court may extend the time for good cause shown.	***natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR* 3.903(A)(7). *The court may extend the time for good cause shown.***
(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule (D).	*(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule* (C).
(d) after diligent inquiry, the identity of the natural father cannot be determined. If so, the court may proceed without further notice or court-appointed attorney for the unidentified person.	*(d) after diligent inquiry, the identity of the natural father cannot be determined. If so, the court may proceed without further notice or court-appointed attorney for the unidentified person.*
(3) The court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to legal counsel *if:*	*(3) The court may find that the natural father waives all rights to further notice, including the right to notice of termination of parental rights, and the right to* an attorney if
(a) he fails to appear after proper notice, or	*(a) he fails to appear after proper notice, or*
(b) he appears, but fails to establish paternity within the time set by the court.	*(b) he appears, but fails to establish paternity within the time set by the court.*

As can be seen from the language of MCR 5.921 [now MCR 3.921], the family division of the circuit court is authorized to give notice to putative fathers if the court "determines that the minor has no father [as defined in the court rule, which includes all forms of legal fathers]." Here, the court found that KeAngelo and KeMaria LaGrone and KeJuan Jefferson were "born out of wedlock" despite the marriage of Richard and Tina Jefferson. Appendix 133b.

While the paternity of these children was questioned by Larry LaGrone, whom copetitioner maintains was not a person who had standing to raise this issue, see Issue I, copetitioner submits that Richard Jefferson's status as legal father could be questioned by any

proper party. Like Larry LaGrone, copetitioner can count.[10] Richard Jefferson, who was in prison when these children were conceived and born, according to Tina Jefferson's sworn testimony, was not their biological father. Because the presumption of legitimacy set forth in MCL 552.29 can be overcome by clear and convincing evidence, *Serafin v Serafin,* 401 Mich 629; 528 NW2d 461 (1977), Tina Jefferson's sworn testimony and Larry LaGrone's DNA tests overcame that presumption in regard to KeAngelo and KeMaria LaGrone and KeJuan Jefferson. Given that Richard Jefferson was in prison during the lives of these children, copetitioner doubts that KeMaria and KeAngelo LaGrone or KeJuan Jefferson called Richard Jefferson "Dad".

Indeed, it should be remembered that even Richard Jefferson might wish to contest his status as legal father because termination of one's parental rights carries with it the possibility of that termination being used as a basis for terminating parental rights to later children. See MCL 712A.19b(3)(*l*). Moreover, if Tina Jefferson's position on appeal is upheld and being the legal father at the time the petition seeking termination is filed ends the inquiry, then, the "presumption of legitimacy" becomes irrebuttable, even though it is not. See *Serafin, supra.*

MCR 5.921(D) [now MCR 3.921(C)] was clearly aimed at situations where the alleged biological father of a child born to an unwed mother failed to perfect his potential legal rights. Now, however, that rule is being applied to situations where the child's mother is married and the legal father is unseated, making the child a bastard. MCR 5.921(D)(2)(b) [now MCR 3.921(C)(2)(b)] is then being used as authority to allow the family court judge to determine that a

[10] Indeed, copetitioner is perplexed by Tina Jefferson's position in this matter when she has maintained that Larry LaGrone is the father of KeMaria and KeAngelo LaGrone and KeJuan Jefferson.

putative father[11] exists and then to terminate his "rights" under the court rules, something which cannot be done in the Juvenile Code. But see MCL 710.37, which allows putative fathers' rights to be terminated under the Adoption Code.

By its language, MCR 5.921 [now MCR 3.921] is about giving notice. It should be noted that while MCR 5.921(D) [now MCR 3.921(C)] provides for notice to "putative fathers", the Juvenile Code itself provides for notification of the hearing seeking the termination of parental rights to "[t]he child's parents." MCL 712A.19b(2)(c). Under MCR 3.903(A)(7), (17) and (18), Larry LaGrone is not a "father", "parent" or "party".

In any event, providing notice does not confer standing. See and compare *In re Hill,* 206 Mich App 689, 693; 522 NW2d 914 (1994), lv den 448 Mich 866 (1995). As discussed in Issues I and II, standing is a matter of substantive law and cannot be created by court rule, Issue III.

Again, copetitioner would note that the Juvenile Code in this case involved the termination of legal parental rights. Issue I. When no legal parental rights exist, they cannot be terminated. See Issue I. Putative fathers[12] have no legal rights under the Juvenile Code. See Issue I.

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[11] Now included in the definitional section of the Juvenile Court Rules in MCR 3.903(A)(23).

[12] Copetitioner would note that the term "putative father" seems to imply that the reputed potential biological father is "a father". He is not. Perhaps "potential male progenitor" would be a better term and not imply any "rights" which can accompany fatherhood.

Appellee Larry LaGrone contends that he is the "legal" father under MCR 3.903(A)(7)(d), which defines a father as "a man judicially determined to have paternal rights." Copetitioner notes that MCR 3.903(A)(7)(d) was added by the May 1, 2003 amendments to the juvenile court rules. Judge Young's decision was rendered on September 9, 2002, Appendices 126b-133b. Under MCR 5.903(A)(4) [now MCR 3.903(A)(7)], a putative father is not a "father" because that definition is limited to legal fathers and the term "putative father" is separately defined under MCR 3.903(A)(23). The definition of "father" in MCR 5.903(A)(4)(a) [now MCR 3.903(A)(7)(a)], which was discussed in *In re CAW* by Justice Weaver, has been amended to reflect the language from the Paternity Act as analyzed in *Girard, supra.* The newly-added MCR 3.903(A)(7)(d) recognizes the doctrine of "equitable fathers", to whom the court has granted the status of a father although that person is not the child's legal or biological father. See *Atkinson v Atkinson,* 160 Mich App 601; 408 NW2d 516 (1987), lv den 429 Mich 884 (1987). This Honorable Court has declined to extend the doctrine of equitable parenthood to unmarried persons and has limited it only to situations where the man was married to the child's mother. *Van v Zahorik,* 460 Mich 320, 331-334; 597 NW2d 15 (1999).

Finally, given Judge Young's, Larry LaGrone's, Frederick Herron's and the guardian ad litem's[13] reliance on *In re Montgomery,* copetitioner will address that case. In *in re Montgomery, supra,* the legal father appealed the probate court's order dismissing him from the termination proceedings. The legal father had testified that he was not the biological father because he, like

[13] Copetitioner notes that the guardian ad litem has changed his position on this issue several times and is now supportive of Judge Young's decision even though he is the appellant. Copetitioner must admit that it cannot cast stones given that copetitioner's Appellate Division has maintained one position based on the statute while copetitioner's Juvenile Division has followed the court rules, bringing this case to where it is today.

Richard Jefferson in the instant case, had been incarcerated at the time the child was conceived and born, even though he remained married to the mother. Applying the court rule definitions, the Court of Appeals held that the dismissal of the legal father, where the presumption of legitimacy had been overcome, was proper.

In the editor's summary of the facts of the case, it was noted that the named biological father's parental rights had been terminated. *Id.* at 341. Nowhere in the opinion is that fact discussed and the alleged termination of the biological father's parental rights was not in issue. The editor's summary of the facts of the case is not binding upon lower courts. See and compare MCR 7.321(2) and *Whipple v Michigan Central Railroad Co,* 143 Mich 41, 43-44; 106 NW 690 (1906). Only the opinion of the Court of Appeals is binding. MCR 7.215(C)(2). Consequently, *In re Montgomery, supra,* is not binding law on the issue of whether a putative father's "rights" can be recognized, let alone, terminated, under the Juvenile Code.

As such, the short answer to this Honorable Court's fourth question is that even though Judge Young could determine that KeAngelo and KeMaria LaGrone and KeJuan Jefferson were not the issue of the marriage (*i. e.,* had no legal father), she had no ability to declare Larry LaGrone to be "the legal father" of those children. Instead, once the children were declared to be born out-of-wedlock, it was up to Larry LaGrone to pursue his potential legal rights under the Paternity Act or to be sued under it.

V. *IN RE CAW* IS DISTINGUISHABLE FROM THE INSTANT CASE BECAUSE HERE THE FAMILY COURT DETERMINED THAT THE CHILDREN WERE BORN OUT-OF-WEDLOCK AND, THEREFORE, THERE WAS A COURT DETERMINATION WHICH ALLOWED THE BIOLOGICAL FATHER AN OPPORTUNITY TO PROCEED TO ESTABLISH LEGAL RIGHTS TO HIS CHILDREN.

Issue Preservation:

This Honorable Court granted leave, directing the parties to address the following issue:

5) Does *In re CAW* apply to this case?

In re KH, KL, KL, and KJ, supra. Appendix 180b.

Standard of Review:

The standard of review is de novo because a question of law is involved. *Thomas, supra.*

Discussion:

In re CAW is factually distinguishable from the instant case because the alleged biological father did not attempt to intervene until after the legal father's parental rights were terminated. As such, there was no determination "'by judicial notice or otherwise' that the child was not 'the issue of the marriage.'" *Id.* at 199. Copetitioner would note that this Honorable Court never reached the issue of whether the court rule would give standing to a putative father if such a determination had been made. *Id.* As such, *In re CAW* is not binding on this case.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Anica Letica, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court reverse Judge Young's opinion and order to the extent that it declared Larry LaGrone the legal father of KeAngelo and KeMaria LeGrone and KeJuan Jefferson and remand for further proceedings with Larry LaGrone and Frederick Herron being stricken from the petition to terminate parental rights or grant any other relief which this Honorable Court deems appropriate.

Respectfully submitted,

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JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: Anica Letica
ANICA LETICA (P38255)
Assistant Prosecuting Attorney

DATED: November 5, 2003